

**ENVIRONMENTAL PROTECTION
AGENCY**

[OPPTS-400099; FRL-4977-9]

RIN 2070-ZA00

**Guidance Implementing Executive
Order 12969; Federal Acquisition;
Community Right-to-Know; Toxic
Chemical Release Reporting****AGENCY:** Environmental Protection
Agency (EPA).**ACTION:** Notice.

SUMMARY: On August 8, 1995, President Clinton signed Executive Order (E.O.) 12969, mandating that each Federal agency include in contract solicitations as an eligibility criterion for competitive acquisition contracts expected to exceed \$100,000, the requirement that Federal contractors ensure that Toxic Chemical Release Inventory Forms (Form Rs) are filed by their covered facilities for the life of the contract. The solicitation must direct offerors to include in their response to the solicitation a certification that the offeror will (if awarded the contract) ensure that its covered facilities file Form Rs for the life of the contract unless an exemption provided by the Executive Order applies. This Notice includes guidance for compliance with E.O. 12969.

DATES: Federal Agencies are required to comply with the provisions of Executive Order 12969, as interpreted by the guidance contained in this Notice, by October 30, 1995.

FOR FURTHER INFORMATION CONTACT: Paul Schaffer, Mail Code 3802F, 401 M St., SW., Washington, DC 20460, in EPA's Office of Acquisition Management, 202-260-9032, for information with respect to contract issues raised by today's guidance. For specific questions concerning the Form R or reporting requirements (including applicability), contact David Arthur, Mail Code 7408, 401 M St., SW., Washington, DC 20460, Telephone: 202-260-2301, e-mail: arthur.david@epamail.epa.gov, in EPA's Office of Pollution Prevention and Toxic Substances. For general information on section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and section 6607 of the Pollution Prevention Act (PPA), contact the Emergency Planning and Community Right-to-Know Hotline, Environmental Protection Agency, Mail Code 5101, 401 M St., SW., Washington, DC 20460, Toll free: 1-800-535-0202 or 703-412-9877, Toll free TDD: 1-800-553-7672.

SUPPLEMENTARY INFORMATION:**I. Introduction**

On August 8, 1995, President William J. Clinton signed Executive Order (E.O.) 12969, entitled "Federal Acquisition and Community Right-to-Know" (60 FR 40989; August 10, 1995). E.O. 12969 initiates a new Federal procurement policy by stating that:

Sharing vital information [on release and management of toxic chemicals] with the public has provided a strong incentive for reduction in the generation, and, ultimately, release into the environment, of toxic chemicals. . . . The efficiency of the Federal Government is served when it purchases high quality supplies and services that have been produced with a minimum impact on the public health and environment of communities surrounding government contractors. Savings associated with reduced raw materials usage, reduced use of costly, inefficient end-of-pipeline pollution controls, reduced liability and remediation costs from worker and community claims all serve to increase the economic and efficient provision of essential supplies and services to the government. . . .

Therefore, it is the policy of the executive branch in procuring supplies and services that, to ensure the economical and efficient procurement of Federal Government contracts, Federal agencies, to the greatest extent practicable, shall contract with companies that report in a public manner on toxic chemicals released to the environment.

The Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) (EPCRA) and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109) (PPA) established programs to protect public health and the environment by providing the public with important information on the toxic chemicals being managed in waste streams or released into the air, land, and water in their communities by manufacturing facilities. The information required by section 313 of EPCRA, 42 U.S.C. 11023, and section 6607 of PPA, 42 U.S.C. 13106, is submitted annually to EPA and the States on a specific reporting form (Form R) and compiled in the publicly available Toxics Release Inventory (TRI).

To implement the procurement policy of E.O. 12969, each Federal agency is required to include in competitive acquisition solicitations for the award of contracts expected to exceed \$100,000, the requirement that Federal contractors ensure that covered facilities file a Form R for covered activities for the life of the contract. In this regard, the solicitation shall direct offerors on affected Federal contracts to include in their response to the solicitation a certification that the offeror (if awarded the contract) will ensure that its covered facilities file a Form R for the life of the contract for

covered activities unless an exemption provided by E.O. 12969 applies. The resulting contract also will contain a clause to this effect.

As described in Unit II. of this document, E.O. 12969 affects Federal contractors and prospective Federal contractors, including certain subcontractors, that own or operate facilities currently required to report under EPCRA section 313 and PPA section 6607. It is not intended to expand the types of facilities currently providing information for the TRI. Rather, it is to ensure that these contractor facilities report by making certification of such reporting a requirement of solicitations and contracts with the Federal government. Once the contract is awarded, failure to comply with the terms of the certification, which will become a part of the contract, may result in termination of the Federal contract or other appropriate action.

Unit II. provides a section-by-section analysis of and interpretive guidance for E.O. 12969, and Unit III. provides a model solicitation certification and contract clause that EPA recommends contracting officers include in subject solicitations and contracts. Finally, Unit IV. clarifies the relationship between the requirements of E.O. 12969 and the reporting requirements of EPCRA section 313 and PPA section 6607, and Unit V. discusses the inter-agency review process EPA used in the development of this guidance.

**II. Section-by-Section Analysis and
Interpretive Guidance**

In the following paragraphs, EPA provides guidance on certain provisions of the E.O. EPA believes that those sections of the E.O. not discussed herein are self-explanatory. Section 2-201. "All definitions found in EPCRA and PPA and implementing regulations are incorporated into this order. . . ."

EPCRA sections 313 and 329 (42 U.S.C. 11023 and 11049) and PPA section 6603 (42 U.S.C. 13102) define terms relevant to the reporting requirements. The EPCRA implementing regulations codify these and other definitions at 40 CFR parts 350 and 372. EPA's Toxic Chemical Release Inventory Reporting Form R and Instructions document further clarifies the statutory and regulatory definitions and is available from the EPCRA Hotline (1-800-535-0202).

Section 2-202. "Federal Agency means. . . ."

A "Federal agency" is equivalent to an "executive agency" as defined in 5 U.S.C. 105. For purposes of E.O. 12969

and this guidance, military departments as defined in 5 U.S.C. 102, are covered under the auspices of the Department of Defense.

Section 2-204. "Toxic chemical means. . ."

In passing EPCRA, Congress established a list of 320 chemicals and chemical categories by combining the Maryland Chemical Inventory Report List of Toxic or Hazardous Substances and the New Jersey Environmental Hazardous Substance List. Recognizing that the chemical list should be dynamic, Congress authorized EPA to add (or delete) a chemical or category through rulemaking at any time if the chemical meets (or does not meet) the statutory criteria listed in EPCRA section 313(d)(2). EPA may undertake to add or delete a chemical on its own initiative, or when petitioned by a State Governor or the public.

E.O. 12969 defines the universe of subject chemicals as those chemicals on the list described in section 313(c) of EPCRA, as it existed on the effective date of the E.O. Thus, E.O. 12969 could be read to effectively "freeze" on August 8, 1995, the list of toxic chemicals and chemical categories required to be reported by Federal contractors' covered facilities. However, E.O. 12969 is not intended to restrict EPA's authority under section 313(d) and (e) of EPCRA to add or delete chemicals by rulemaking from the list of chemicals as it existed on August 8, 1995. Consequently, EPA believes a reasonable reading of the E.O. is to permit the list of subject toxic chemicals to be modified to exclude those chemicals that are deleted and, similarly, to include those chemicals that are added, by EPA rulemaking pursuant to EPCRA section 313(d) and (e).

If E.O. 12969 were read to "freeze" the list of chemicals for which the covered facilities of a Federal contractor must submit Form Rs, those facilities would not be permitted to stop reporting for a chemical that EPA, under the authority of EPCRA section 313(d) and (e), deletes from the list on the ground that the chemical does not meet the statutory criteria for listing. EPA does not believe that E.O. 12969 is intended to result in such a situation.

In addition, if E.O. 12969 were read to "freeze" the list, Federal contractors would not be required to certify that their subject facilities will file the Form Rs for those chemicals that EPA adds to the list of toxic chemicals subsequent to August 8, 1995. However, the covered facilities of Federal contractors would nonetheless be required to file Form Rs on these added chemicals to comply

with their EPCRA section 313 and PPA section 6607 reporting requirements. EPA believes that all toxic chemicals and chemical categories that are currently on or subsequently added to the list of toxic chemicals, based on the statutory listing criteria, potentially can affect human health or the environment. As such, EPA believes that certification by Federal contractors for these chemicals and chemical categories is appropriate and desirable because filing a Form R provides the public with important information on these toxic chemicals.

Accordingly, EPA interprets E.O. 12969 as requiring Federal agencies to require prospective Federal contractors (and first-tier subcontractors as defined below) to provide a certification, such as the model certification described below, for all toxic chemicals currently listed or added to the EPCRA 313 list, until such time as EPA deletes a toxic chemical through rulemaking, using the statutory criteria of EPCRA section 313(d)(2).

Section 2-206. "Federal contractor means. . ."

For the purposes of E.O. 12969 and this guidance, a Federal contractor is that entity that has submitted the successful bid or proposal in response to a competitive acquisition solicitation, and that has one or more facilities that will be used in the performance of the contract located in any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States has jurisdiction. A prospective Federal contractor (otherwise referred to in this guidance as an "offeror") is the entity that submits a bid or proposal in response to a competitive acquisition solicitation.

To the extent that an offeror or a Federal contractor has a facility that will provide the supplies or services in the performance of the contract but the facility is located outside of the above identified areas, that facility is not affected by E.O. 12969. When an offeror or Federal contractor is located outside the above identified areas, but has facilities that will provide the supplies or services that are located in the United States or its territories, the facilities are covered under E.O. 12969. Therefore, the prospective Federal contractor should be required to supply the certification for such covered facilities. EPA believes it is appropriate that the applicability of E.O. 12969 be determined based on where the

facility(ies) providing the supplies or services under contract are located.

Also, EPA believes it appropriate and consistent with E.O. 12969 to require Federal agencies to apply the provisions of the E.O. to a first-tier subcontractor through the prime Federal contractor (i.e., first-tier subcontractors should certify to the prime contractor). For purposes of E.O. 12969, a first-tier subcontractor is an entity that is a supplier, distributor, vendor, or firm that furnishes supplies or services directly to or for the prime Federal contractor. Both prospective Federal prime contractors and first-tier subcontractors would certify only for those facilities that will provide the supplies or services in the performance of the contract. To the extent that a prime contractor (or offeror) is not subject to the provisions of E.O. 12969, no prospective or actual subcontracts awarded under the prime contract will be subject to the provisions of E.O. 12969.

EPA believes that the provisions of E.O. 12969 apply to offerors, Federal contractors, and first-tier subcontractors that will be or are providing commercial items under contract. Since passage of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), Federal agencies have been working to streamline the acquisition of commercial items, and EPA supports these efforts. In this regard, the final rule for the acquisition of commercial items includes a contract clause (See Federal Acquisition Regulations (FAR), 48 CFR 52.212-4, published September 18, 1995; 60 FR 48206) which will be included in contracts for commercial items:

(q) *Other compliances.* The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

This language will be included in the contract by a new Standard Form 1449-Solicitation/Contract Order for Commercial Items.

Because EPA interprets E.O. 12969 to apply to the acquisition of commercial items, EPA believes that where the resulting contract includes the clause 52.212-4, the contractor must comply with E.O. 12969. Therefore, in contracts for the acquisition of commercial items, EPA does not believe that an additional solicitation certification or contract clause is necessary to implement E.O. 12969. Thus, solicitation certifications and contract clauses such as the models presented in Unit III. of this document need not be included in solicitations or Federal contracts for commercial items.

Section 3-301. "Each Federal agency shall, to the maximum extent practicable, include. . . ."

Each Federal agency, shall, to the maximum extent practicable, include in competitive acquisition solicitations that will result in the award of a contract expected to exceed \$100,000 (including all options), the certification described in sections 3-303 and 4-404 of the E.O. relating to the requirement for the contractor's facilities to file a Form R. If the contract is expected to exceed \$100,000, the prospective Federal contractor must complete the certification in order to be eligible for the award of the contract.

EPA believes that the E.O. should be read to require the prospective Federal contractor to certify in its response to the solicitation that its covered facilities meeting the applicability requirements detailed in EPCRA section 313 on the date of issuance of E.O. 12969, will file (and continue to file for the life of the contract) a Form R, for each toxic chemical manufactured, processed, or otherwise used at each facility used in the performance of the contract. Offerors who believe that all of the facilities that will be used in the performance of the contract are currently exempt from the reporting requirements of EPCRA section 313 and PPA section 6607 must certify to this effect in its response to the solicitation and must certify that, should such an exemption cease to apply for a subject facility, they will timely file the appropriate Form R(s) during the life of the contract.

The requirements for the certifications described above (and a model of which is presented in Unit III.) should be included in all competitive acquisition solicitations issued October 30, 1995 expected to result in a contract with a Federal contractor exceeding \$100,000, including all options, and will be incorporated into the resultant Federal contract by a contract clause.

The certification must be completed by the offeror on behalf of all of its facilities that will provide supplies or services in the performance of the Federal contract. Because offerors may own or operate more than one facility, there may be situations where some of its facilities are subject to the filing and reporting requirements of the E.O. while others are exempt. In these cases, the offeror would not be able to certify that it is exempt under paragraph (b) of the model certification described below in Unit III. unless all of its facilities that will provide supplies or services in the performance of the contract meet at least one of the criteria for exemption in paragraph (b) of the certification.

The certification requirement applies to all prime Federal contracts and first-tier subcontracts for non-commercial supplies and services where the contract or subcontract is expected to exceed \$100,000. The prime Federal contractor shall include in all competitive solicitations and resulting subcontracts (for first-tier subcontracts) for non-commercial items that are expected to exceed \$100,000, a certification and contract clause such as the models presented in Unit III below. As stated previously, a separate contract clause and certification are not required in contracts for the acquisition of commercial items because these contracts will contain the clause set forth in 48 CFR 52.212-4.

The certification requirement shall also apply to competitive section 8(a) solicitations and contract awards expected to exceed \$100,000 (including all options) that are expected to exceed \$100,000 which are under section 8(a) of the Small Business Act, 15 U.S.C. 637(a).

Section 3-302. "The Federal contractors to the. . . ."

The certification requirement should apply only to those offerors (prospective prime contractors and first-tier subcontractors) who own or operate facilities to be used in performance of the proposed contract having Standard Industrial Classification Code (SIC) designations of major groups 20 through 39 as described in EPCRA section 313(b)(1) as they existed on the date of issuance of E.O. 12969. SIC Code major group designations 20 through 39 represent the manufacturing sector and include establishments engaged in the mechanical or chemical transformation of materials or substances into new products. These establishments are usually described as plants, factories and mills. It is important to note that assembly plants also are normally included within major groups 20 through 39.

Section 3-303. "Each Federal agency shall find that. . . ."

The reporting requirements of E.O. 12969 are not applicable to a facility within a SIC code major group designation 20 through 39, if any of the criteria in clauses (a) through (c) of section 3-303 apply to the facility. Accordingly, if a prospective Federal contractor can certify that each of its covered facilities that will be used in the performance of the contract meets at least one of the criteria in clauses (a) through (c), none of the contractor's facilities would be required to submit data pursuant to E.O. 12969 and the offeror can certify to this effect.

However, the Federal contractor would notify the contracting officer if circumstances change such that, for example, a covered facility supporting the contract is no longer exempt. The solicitation and contract should reflect this requirement and the requirement that the Federal contractor then ensure that its covered facility(ies) supporting the contract file the information required by E.O. 12969.

Persons who are unsure of the applicability of these criteria should review the implementing regulations found at 40 CFR part 372, as well as EPA's "Toxic Chemical Release Inventory Reporting Form R and Instructions" (Revised 1994 Version, EPA 745k-95-051).

On November 30, 1994 (59 FR 61448), EPA issued a final rule establishing an alternate threshold under the authority of EPCRA section 313(f)(2) (40 CFR part 372). Starting with the 1995 reporting year, facilities that exceed the manufacture, process, or otherwise use threshold established under EPCRA section 313(f)(1) do not have to file a Form R if the facility manufactures, processes, or uses 1 million pounds or less per year of the toxic chemical and the facility estimates that its total reportable amount of the toxic chemical in waste streams is 500 pounds or less. (The total reportable amount of the toxic chemical in waste streams includes the quantity released to the environment; the quantity recycled, combusted for energy recovery, treated or disposed on-site; and the quantity transferred off-site for recycling, combustion for energy recovery, treatment, disposal or other release.) Facilities meeting the alternate threshold criteria are able to submit a much shorter form to EPA indicating that the facility met the requirements of the alternate threshold.

Because the alternate threshold of 1 million pounds was established under the authority of EPCRA section 313(f)(2), a prospective Federal contractor with facilities that use the alternate threshold should certify consistent with section 3303(c), that is, the reporting thresholds established under EPCRA section 313(f) have not been met.

Section 3-304. "Each Federal agency shall require. . . ."

See section 2-204.

Section 3-305. "Each Federal agency may amend. . . ."

This provision is self-explanatory. The decision to amend existing contracts rests solely with each Federal agency.

Section 3-306. "Consistent with Title IV of the Federal Acquisition Streamlining Act of 1994 (FASA). . . ."

Title IV of the Federal Acquisition Streamlining Act (FASA) raised the simplified acquisition threshold to \$100,000 (i.e., contracts for the purchase of goods and services that have an anticipated value greater than \$2,500 but not greater than \$100,000 are subject to simplified acquisition procedures). To be consistent with FASA, EPA believes that only competitive acquisition solicitations that are expected to result in a contract exceeding \$100,000, including options, should include the certifications required by E.O. 12969 (the certification should also be incorporated into the resultant contract).

Section 4-401. "Not later than September 30, 1995, the EPA shall publish. . . ."

The publication of today's Notice satisfies the requirement of this section. Section 4-402. "Within 30 days of the issuance of the guidance. . . ."

All Federal agencies must comply with the provisions of the E.O. by October 30, 1995, and the E.O. requires that these provisions be implemented and incorporated into the Federal Acquisition Regulations (FAR). The FAR Secretariat has assigned the effort to amend the FAR pursuant to E.O. 12969 as FAR Case 95-305.

Once FAR Case 95-305 is published as an interim final rule, Federal agencies, offerors, and Federal contractors must follow those regulations. In the event that FAR Case 95-305 is not published as an interim rule by October 30, 1995, EPA is providing this Notice, including a model certification and contract clause, to assist Federal agencies in their compliance efforts. Pending implementation in the FAR, EPA encourages certifications such as this model to be included in all competitive solicitations (and resultant contracts) expected to result in a contract exceeding \$100,000 that are issued on or after 30 days following publication of this guidance in the Federal Register in order to comply with E.O. 12969.

Section 4-403. "For all contracts expected to exceed \$500,000. . . ."

E.O. 12969 requires compliance by Federal agencies "to the greatest extent practical"; however, it makes clear that impracticability determinations should not be made lightly. Because the facilities of offerors likely to be affected by E.O. 12969 already have an obligation to report under EPCRA section 313 and PPA section 6607, it is difficult to foresee instances when it would be impracticable for a Federal

agency to include a TRI certification requirement as an eligibility criterion in its affected solicitations.

However, E.O. 12969 does recognize that there are or may be unforeseen circumstances that would make compliance untenable. For smaller affected contracts (those not expected to exceed \$500,000, including options), the contracting agency should make impracticability determinations, for either an individual or class of contracts, weighing the reasons for believing that inclusion of the certification is impracticable for a particular solicitation against the compelling reasons for E.O. 12969. Where appropriate, agencies should consider modifications to the solicitation that would then make inclusion of the certification acceptable.

For larger contracts (those expected to exceed \$500,000, including options), E.O. 12969 imposes a consultation requirement on the contracting agency before a final impracticability determination can be made. Each Federal agency shall notify and consult with the Director of the Environmental Assistance Division within EPA's Office of Pollution Prevention and Toxic Substances (Mail Code 7408, 401 M St., SW., Washington, DC 20460) when the agency believes it is not practicable to include the certification requirement in the solicitation. This consultation should occur before the Agency's final determination on inclusion of the certification in the solicitation. EPA will continue to work with other agencies to reduce any burden associated with this consultative process.

A Federal agency's determination that including the certification requirement in a solicitation is impracticable does not in any manner waive the Federal contractor facility's responsibility to comply with the reporting provisions of EPCRA and the PPA. Section 4-404. "Each Federal agency shall require. . . ."

For a discussion of the certification requirements, see the discussion for sections 3-301 through 3-303 above. It is important to note that on or before July 1 of each year is the deadline for submitting EPCRA and PPA data for the previous calendar year. For example, Form Rs submitted on or before July 1, 1996, cover the period January 1, 1995 through December 31, 1995. E.O. 12969 requires offerors to certify that their subject facilities will file the necessary Form Rs, including all information required under EPCRA and PPA, on or before the next July 1 after the date on which a contract is awarded.

Currently, contractor facilities affected by this E.O. are already

submitting reports because of their obligations under EPCRA section 313 and PPA section 6607. This may not always be the case. Therefore, EPA strongly encourages appropriate personnel at any facility owned or operated by a potential Federal contractor to maintain the information necessary to complete and submit Form Rs for the toxic chemicals reportable under E.O. 12969 for the previous calendar year. This will greatly ease compliance with section 4-404(b) of the E.O. should the contractor obtain a contract with the Federal Government. Section 4-405. "Information submitted to the EPA. . . ."

Information submitted to EPA pursuant to E.O. 12969 is subject to the trade secret protections provided by EPCRA section 322, 42 U.S.C. 11042. EPCRA section 322 allows an owner or operator to withhold only "the specific chemical identity (including chemical name and other specific identification)" from TRI reports.

Regulations implementing the trade secret provisions of EPCRA section 322 are codified at 40 CFR part 350. Under the provisions of 40 CFR part 350, EPA reviews the validity of a trade secret claim if the Agency receives a public request for disclosure of information claimed as chemical identity, or at any time if "EPA desires to determine whether chemical identity information claimed as trade secret is entitled to trade secret treatment, even though no request for release of the information has been received." In practice, EPA routinely reviews all trade secret claims relating to TRI reports.

Under the authority of E.O. 12969, EPA will review all claims for trade secret protection submitted by Federal contractors. If EPA determines that the contractor's claim of trade secrecy is invalid (following the review, appeals, and notification processes described in 40 CFR part 350), EPA will make the Form R available to the public and will include the information in the TRI data base.

Section 4-406. "When the Administrator determines. . . ."

If EPA determines that a Federal contractor (or first-tier subcontractor) has inaccurately, incompletely, or falsely certified as to its covered facility's compliance with the E.O. or that a Federal contractor's (or subcontractor's) covered facility has deliberately not filed the Form R or deliberately filed incomplete information, EPA may recommend to the head of the contracting agency a termination of the affected contract for the convenience of the Government or

other appropriate action (for subcontractors, EPA may recommend to the prime contractor that it consider a termination of the subcontract for convenience or other appropriate action). Although a Contracting Officer is not obligated to actually determine compliance or non-compliance with the requirements of the E.O., that individual should forward to EPA any information it receives regarding non-compliance.

Section 4-408. "Upon request and to the extent practicable, the Administrator shall provide technical advice. . . ."

This provision is self-explanatory. However, see the "FOR FURTHER INFORMATION CONTACT" unit of this Notice for names and addresses of EPA contacts.

Section 5-502. "This Order is not intended, and should not be construed, to create any right or benefit. . . ."

Executive Order 12969 does not create additional rights or benefits for private parties and does not allow for private rights of action to ensure agency compliance. While E.O. 12969 provides other mechanisms for compliance, the right to sue a Federal agency for failure to appropriately include the certifications required by E.O. 12969 in contract solicitations is not one of them. However, E.O. 12969 in no manner undermines any opportunity provided by EPCRA or PPA to bring an action against a Federal contractor or its facilities and subcontractors otherwise required to report for failure to comply with the reporting requirements of EPCRA section 313 or PPA section 6607. Section 5-503. "This order shall be effective immediately. . . ."

Although E.O. 12969 is effective immediately (i.e., August 8, 1995), Federal agencies are not required by the E.O. to include a certification statement implementing the E.O. in affected solicitations until October 30, 1995.

III. Model Solicitation Certification and Contract Clause

Models of the solicitation certification and the contract clause required by E.O. 12969 are presented below. The FAR Secretariat has assigned the effort to amend the FAR pursuant to E.O. 12969 as FAR Case 95-305. Until the FAR Case is published as an interim rule in the Federal Register, EPA encourages Federal agencies to include, pursuant to E.O. 12969, the model solicitation and contract clause discussed herein in all competitive solicitations (and resultant contracts) expected to result in a contract exceeding \$100,000 that are issued on or after 30 days following publication of this guidance in the Federal Register.

Instructions for Use of the Model Certification and Contract Clause:

For competitive solicitations for the acquisition of noncommercial items issued on or after October 30, 1995 that are expected to result in the award of a contract exceeding \$100,000, including all options, EPA encourages Federal agencies to include in the solicitation the certification (or the substantial equivalent) as shown below. In addition, each Federal agency is encouraged to include in the resultant contract the contract clause shown below or the substantial equivalent. Model Certification of Filing Toxic Chemical Release Inventory Reporting Form (Form R).

Prescription for the Provision:

The Contracting Officer should insert the following provision in all competitive solicitations for non-commercial items (including competitive 8(a) solicitations) where the resultant contract is expected to exceed \$100,000, including all options.

Certification of Filing Toxic Chemical Release Inventory Reporting Form (Form R)

The following certification shall be completed by the offeror, who certifies for all of its covered facilities that will be used in the performance of this proposed contract. Under EPCRA section 313 and PPA section 6607, each facility within Standard Industrial Classification Code designation of major groups 20-39 as in effect on July 1, 1985 (and currently codified at 48 CFR 19.102) meeting the reporting requirements files a Form R. If none of the offeror's facilities that will be used in the performance of this proposed contract currently are subject to the Form R reporting requirements because they are not with Standard Industrial Classification (SIC) code designations of major groups 20-39 (as in effect on July 1, 1985), the offeror should check box (e). This would complete the offeror's certification requirements. Further, if all of the offeror's facilities that will be used in the performance of this proposed contract meet at least one of the criteria in paragraph (b) below, the offeror should check the appropriate box under (b) to certify to that effect. This also would complete the offeror's certification requirements. For offerors with more than one facility, however, there may be situations where some of its facilities are subject to the Form R filing and reporting requirements and others are exempt. In these cases, the offeror cannot certify that it is exempt under paragraph (b) below unless all of its covered facilities meet at least one of the criteria in paragraph (b) of the certification.

(a) The Offeror, by signing this offer, expressly certifies and agrees that:

If awarded a Contract resulting from this solicitation, its covered facilities that will be used in the performance of this proposed contract will file (and continue to file for the life of the contract), unless otherwise exempt as stated below in paragraph (b)(1)-(3), a Toxic Chemical Release Inventory Form (Form R) as described in sections 313(a) and (g) of EPCRA, 42 U.S.C. 11023(a) and (g) and section 6607 of PPA, 42 U.S.C. 13106, for each toxic chemical manufactured, processed, or otherwise used by the offeror at a facility as described in section 313 of EPCRA, 42 U.S.C. 11023, and section 6607 of PPA, 42 U.S.C. 13106. The offeror further agrees and certifies that during the period of performance of this proposed contract, its covered facilities that will be used in the performance of this proposed contract will file a Form R annually on or before July 1 (for the prior calendar year) with the United States Environmental Protection Agency and each appropriate State pursuant to section 313(a) and (g) of EPCRA; or

(b) To the best of its knowledge and belief, none of its covered facilities that will be used in the performance of this proposed contract are currently subject to the filing and reporting requirements set forth in paragraph (a) above because such facilities (the offeror must check all of the appropriate boxes):

[] (1) Do not manufacture, process or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023 (c); or

[] (2) Do not have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A); or

[] (3) Do not exceed the reporting thresholds, including the alternative threshold established in 40 CFR 372.27, of toxic chemicals established under EPCRA, 42 U.S.C. 11023(f).

(c) If awarded a Contract resulting from this solicitation, and circumstances change during the life of the Contract such that, for example, any of its facilities that will be used in the performance of this proposed contract become subject to E.O. 12969 because none of the exemptions in paragraph (b) above any longer apply (or it no longer is subject to E.O. 12969 reporting and filing requirements) it will provide written notice to the Contracting Officer, and if required, its facility(ies) to be used in the performance of this proposed contract will file and continue to file for the life of the contract a Form R as described in paragraph (a).

(d) If awarded a Contract resulting from this solicitation, it shall include a

certification substantially the same as this certification in every competitive solicitation for a first tier subcontract expected to be greater than \$100,000 where the subcontract is not for "commercial items" as that term is defined in Part 2 of the FAR.

[] (e) It does not own or operate any facilities that will be used in the performance of this proposed contract having Standard Industrial Classification Code designations of major groups 20 through 39 as identified on July 1, 1985, (and currently contained in FAR section 19.102) consistent with EPCRA section 313(b)(1). If, however, the offeror is awarded the contract, and the status of any of its facilities used in the performance of this contract changes during the life of the contract, it will provide written notice to the Contracting Officer, and if required, complete this certification. Further, the offeror will include a certification substantially the same as this certification in all competitive solicitations for first-tier subcontracts for noncommercial items expected to exceed \$100,000.

(f) This certification concerns a matter within the jurisdiction of an agency of the United States and that making a false, fictitious, or fraudulent certification may result in criminal prosecution under Title 18, United States Code, Section 1001, and/or administrative action under the Program Fraud Civil Remedies Act, Title 31, United States Code, Sections 3801-3812. Accordingly, the offeror expressly certifies the truthfulness and accuracy of the contents of this certification.

(End of Provision)

The information provided on the Toxic Chemical Release Form filed with EPA shall be subject to the trade secret protection provided by section 322 of EPCRA, 42 U.S.C. 11042. Information that is not trade secret shall be made available to the public pursuant to sections 313(h) and (j) of EPCRA.

MODEL TOXIC CHEMICAL RELEASE REPORTING REQUIREMENTS CLAUSE

Prescription for clause: The Contracting Officer shall include this clause in all competitively awarded contracts for noncommercial items (including competitive 8(a) awards) in excess of \$100,000 (including all options).

Toxic Chemical Release Inventory Reporting

(a) As used in this clause, "Toxic Chemical Release Inventory Reporting," the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. 11001-11050) (EPCRA) and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109) (PPA), established programs to protect public health and the environment. Under these Acts, certain businesses are required to submit reports each year on the amounts of toxic chemicals their facilities release into the environment.

(b) The contractor shall comply, during the life of the contract, with the certification in the solicitation entitled, "Certification of Filing Toxic Chemical Release Inventory Reporting Form (Form R)," which is expressly incorporated into the contract by reference.

(c) First tier subcontractors.--The Contractor shall include a certification substantially the same as the certification identified in paragraph (b) above in competitive solicitations for first tier subcontracts where the resulting subcontract award is expected to be greater than \$100,000 and is not for "commercial items" as that term is defined in Part 2 of the Federal Acquisition Regulation. Also, the Contractor shall insert in all such first tier subcontracts a clause substantially the same as this clause without this paragraph (c).

(d) Remedies.--If the Contractor inaccurately, incompletely or falsely certified as to a facility's compliance with the reporting requirements of EPCRA section 313 and PPA section 6607, or if any of the Contractor's facilities has deliberately not filed a Toxic Chemical Release Form, or

deliberately not submitted complete information, the Contracting Officer may terminate the Contract for convenience or take other appropriate action.

(End of Clause)

IV. Relationship Between E.O. 12969 and EPCRA/PPA Reporting Requirements

Nothing in E.O. 12969 or this guidance replaces or obviates the obligation of a facility owner or operator to comply with the reporting and recordkeeping requirements of EPCRA section 313, PPA section 6607, and EPA's implementing regulations at 40 CFR part 372. Although E.O. 12969 establishes a \$100,000 applicability threshold, it is important for the regulated community to recognize that no such threshold exists with respect to the reporting or recordkeeping requirements of EPCRA section 313 or PPA section 6607.

V. Executive Order 12866

Pursuant to Executive Order 12866 (58 FR 51735, October 4, 1993), it has been determined that this is a "significant regulatory action," because this Guidance may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. This Guidance was submitted to OMB for review under the Executive Order. In addition, EPA distributed a draft guidance to other agencies for their review and comment. Any changes made during OMB review have been documented in the public record.

List of Subjects

Environmental protection and Community right-to-know.

Dated: September 25, 1995.

Carol M. Browner,
Administrator.

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